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Brexit, Human Rights and the Constitutional Future of these Islands

Colin Harvey*

Many predicted that Brexit would have a destabilising impact on relationships across these islands. The fact that these assessments turned out to be correct is of little comfort now. One of the more intriguing aspects of the discussion, however, is the renewed attention being paid to the situation in Northern Ireland, as well as questions around human rights in general.¹ This includes a debate on the future of the EU Charter of Fundamental Rights. As will be explained, these matters are now bound together.

Who would have thought that Brexit would lead to EU-wide endorsement of the Belfast/Good Friday Agreement 1998?² It is hard to read the ‘Ireland/Northern Ireland’ section of the Joint Report on Phase 1 of the negotiations in any other way.³ The risk in this is that casual references to that Agreement might discourage attention to detail, and avoidance of hard constitutional, legal and political realities. The Agreement is a multi-party political agreement but it is also underpinned by international law (a bi-lateral British-Irish Agreement⁴) and that component can be neglected. As it advances through the Brexit process, the UK Government is legally bound by this international agreement and remains (with the Irish Government) a co-guarantor. With that in mind there are a few things to underline.

First, human rights and equality are at the heart of the 1998 Agreement. When people refer to this document it is essential that they are reminded of this. It is also vital to recall that substantial projects from 1998, including a Bill of Rights for Northern Ireland and a Charter of Rights for the island of Ireland, are adrift with no responsibility currently being taken for their practical advancement. As if this was not worrying enough, once the Conservative Party has taken care of Brexit it plans to revisit its promise to repeal and replace the Human Rights Act 1998.⁵ The failure to deliver on this promise *thus far* should not deceive us into complacency. Where will attention turn once liberation from the EU has been secured? It would be foolish to believe that rights and equality guarantees (for EU citizens, for example) will necessarily stick or to trust in promises that are not firmly nailed down now. In these discussions, future enforcement and implementation must be in our minds. The limits of the UK’s flexible constitution are well known and this fact presents an ever-present risk to basic guarantees. The Joint Report is clear that the UK Government will ensure that there will be ‘no diminution’ of rights in Northern Ireland as a result of Brexit.⁶ It is also plain that the intention is that Irish citizens in Northern Ireland will retain rights as EU citizens (as one part of respecting the right to choose to be Irish or British or both).⁷ Work will continue in the negotiations within the separate strand that is considering Ireland/Northern Ireland matters. But this raises an immediate question. The decision of the UK

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¹ Explained also, of course, by the ‘Confidence and Supply Agreement’ between the DUP and the Conservative Party, www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/agreement-between-the-conservative-and-unionist-party-and-the-democratic-unionist-party-on-support-for-the-government-in-parliament [Accessed 15 December 2017].

² The Belfast Agreement, 10 April 1998, www.gov.uk/government/publications/the-belfast-agreement [Accessed 15 December 2017].

³ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union, https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en [Accessed 15 December 2017].

⁴ <http://treaties.fco.gov.uk/docs/pdf/2000/TS0050.pdf> [Accessed 15 December 2017].

⁵ Forward Together: Our Plan for a Stronger and a Prosperous Future: The Conservative and Unionist Party Manifesto 2017, www.conservatives.com/manifesto [Accessed 15 December 2017], p 37.

⁶ See n 3 para 53.

⁷ See n 3 para 52.

Government to remove the EU Charter of Fundamental Rights appears to be in breach of these commitments (as they relate to Northern Ireland).

Second, the Agreement is structured around relationships across these islands. Its values and principles are intended to be embedded within linked institutions, including the Northern Ireland Assembly and Executive, the North-South Ministerial Council, the British-Irish Council and the British-Irish Intergovernmental Conference (among others). There have been changes since 1998, and the political dynamic has altered significantly. But that sort of *relational* thinking (anchored in respect for human rights and equality) is badly needed again. Brexit has rocked the foundations and plunged everyone into a state of heightened constitutional anxiety. Those who suggest that this is an overreaction miss how much faith people had invested in the ‘constitutional fundamentals’ of the peace process in Northern Ireland. It is only by securely returning to those ‘fundamentals’ that a sustainable future is possible, and that means continuing respect for the vision of human rights and equality outlined in the 1998 Agreement.

Third, there is a neglected and misunderstood human rights component. It is the option of ‘the people of the island of Ireland’ to exercise ‘their right of self-determination’.⁸ The formula is complex and was worked out over decades. There must be no ‘external impediment’ and it must be based on ‘consent, freely and concurrently given’ in both jurisdictions.⁹ Northern Ireland has a lock on the process, ‘as this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland’.¹⁰ The current democratic will rests Northern Ireland within the UK (for now), and ‘status as part of the United Kingdom reflects and relies upon that wish’.¹¹ If, however, the right of self-determination is exercised in the way outlined, and the outcome is agreement in both jurisdictions, then there is a ‘binding obligation’ on both governments to ‘introduce and support legislation ... to give effect to that wish’.¹² The right is recognised in international law (British-Irish Agreement) and reflected in domestic law in both states (in the Irish Constitution and in the Northern Ireland Act 1998). As is well known, the Northern Ireland Act 1998 gives the Secretary of State a key decision-making role for Northern Ireland (‘the Secretary of State shall exercise the power ... if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland’).¹³ The adopted formulation remains intriguing. Why is this right of self-determination so significant now? Because one way for Northern Ireland to remain in the EU is to leave the UK. Stating this is likely to invite quite strong reactions, and that is troubling. If, as so many never tire of observing, the constitutional status of Northern Ireland rests on consent alone then what is the problem with testing it? The responses can be unintentionally revealing, because they suggest that this aspect of the Agreement is in fact not really accepted. There is much about the debate over this right that is open for discussion, and the challenges are real. The point is that Ireland and Northern Ireland already have an *agreed mechanism* for exercising this right of self-determination (in a world where even that is a fundamentally contested notion). As well as insisting that ‘no diminution’ has immediate implications for the EU (Withdrawal) Bill, it is also time to normalise this aspect of the ‘consent conversation’, especially when there is such current fondness for the 1998 Agreement. It is vital to be clear about what is being said and not said. The priority remains securing specific solutions that fully respect the special constitutional status that Northern Ireland already has (remember too that Northern Ireland voted to remain). However, if no specific solutions can be found to accommodate these unique circumstances then what is the precise problem with asking people if they want to remain in one union by leaving another? This really

⁸ See n 2 ‘Constitutional Issues’ para 1.

⁹ See n 2 ‘Constitutional Issues’ para 1 (ii).

¹⁰ See n 2 ‘Constitutional Issues’ para 1 (ii) and see also (iii).

¹¹ See n 2 ‘Constitutional Issues’ para 1 (iii).

¹² See n 2 ‘Constitutional Issues’ para 1 (iv).

¹³ Northern Ireland Act 1998 schedule 1, para 2.

is an existential conversation about the constitutional future of the UK and relationships across these islands.